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The Expanding Labor Dimension of US-Negotiated Regional Trade Agreements: TPP and USMCA

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An Appraisal of the Labor Chapter of the Trans-Pacific Partnership

Remarks Submitted to the Committee on Ways and Means Democrats

by Steve Charnovitz*

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1. The Labour chapter of the Trans-Pacific Partnership (TPP) is the most progressive set of labor obligations ever to be negotiated in a free trade agreement.

2. The TPP is an enhanced second-generation worker rights chapter in a free trade agreement (FTA):

-- In the *first* generation of worker rights, US FTAs incorporated the labor principles and labor rights of the International Labour Organization (ILO) Declaration of 1998, yet did so only with a soft obligation.[1] The US trading partners were Australia, Bahrain, Central America/Dominican Republic, Chile, Jordan, Morocco, Oman, and Singapore. Those agreements also included an obligation not to fail to enforce domestic labor laws in a manner affecting trade between the parties.[2] This obligation grew out of a similar formulation in the labor side accord to the North American Free Trade Agreement (NAFTA).

-- The May 10, 2007 Bipartisan Trade Deal ushered in the *second* generation of worker rights in FTAs through a hard obligation to "adopt and maintain" in domestic law the fundamental rights enshrined in the ILO Declaration.[3] This was the template used in the US FTAs with Colombia, Korea, Panama, and Peru. These FTAs also contain a commitment not to waive or derogate from regulations implementing these international rights. The significance of the second generation of FTA-related worker rights can be understood by looking at what it adds to the underlying regime of international labor law. Although all US FTA partners are member states of the ILO, the ILO Declaration does not have a compliance system and many countries (including the United States) have not ratified some of the

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[1]The precatory FTA language was "strive to ensure." This treaty language met the terms of the TPA labor negotiating objectives enacted in the Trade Act of 2002.

[2]This obligation was the cause of action in a 2014 complaint by the United States against Guatemala. This dispute is now before a tribunal.

[3]These rights are freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of compulsory or forced labor, effective abolition of child labor and prohibition of the worst forms of child labor, and the elimination of discrimination in respect of employment and occupation.

underlying ILO conventions protecting the fundamental rights. Therefore, the US FTAs graft on enforceability to the ILO Declaration.

3. The TPP labor chapter enhances second-generation worker rights in several key ways:

--First, the TPP obligates each party to "adopt and maintain" statutes, regulations, and practices governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, as determined by that party.

--Second, the obligation not to waive or derogate from fundamental labor rights or conditions of work is specifically applied to special trade or customs areas such as export processing zones (EPZs).

--Third, the TPP obligates each government to "discourage, through initiatives it considers appropriate" the importation of goods produced by forced or compulsory labor. In that regard, the TPP clarifies that it is not authorizing any initiative that would be inconsistent with World Trade Organization (WTO) law.

These three enhancements achieve a significant improvement to worker rights obligations as compared to the most recent set of US FTAs. Although the TPP's conditions-of-work provision does not incorporate the applicable ILO conventions, for countries that are not a party to those ILO conventions, this TPP commitment may be the only international obligation a country has on such issues. For example, consider the ILO Minimum Wage Fixing Convention (No. 131) of 1970. Only three TPP countries are party to the ILO Convention (Australia, Chile, and Japan), and therefore the remaining TPP countries will strengthen their international obligations on minimum wage fixing. The TPP's specific prohibition for EPZs promotes a longtime goal of labor rights advocates as far back as the 1970s. Therefore, the EPZ provision in the TPP is as an important milestone. The norm of discouraging imports produced by forced labor has been reflected in US law since 1890, but so far has surfaced in US trade agreements only as a reserved right rather than a mutual obligation. So here too the TPP makes a breakthrough.

4. To assess the accuracy of USTR's claim that "TPP has the strongest protections for workers of any trade agreement in history..." we need to examine other preferential agreements such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) of 2014. In one respect, CETA's Trade and Labour chapter is stronger than TPP in linking labor law commitments to the ILO's Decent Work Agenda and in agreeing to "continued and sustained efforts" toward ratifying fundamental ILO conventions. On the other hand, CETA's labor chapter appears to lack remedies for non-compliance. So USTR's claim is warranted.

5. By contrast, the TPP Labor Chapter is enforceable through TPP's general dispute settlement chapter which makes some procedural improvements over previous FTA

dispute systems. Like the dispute settlement system of the WTO, the ultimate remedy for non-compliance of state-to-state disputes would be a trade sanction. Before utilizing this TPP dispute system for labor matters, however, the disputing parties must first engage in "Labour Consultations" (Article 19.15).

6. The TPP provides a labor cooperation mechanism with an indicative agenda (see Article 19.10) that is broader than in previous US FTAs. The cooperation is to be spearheaded by a Labour Council composed of senior government representatives from each TPP country. This intergovernmental Council is specifically directed to receive and consider the views of interested persons and these public transparency and participation provisions evidence improvement over the cooperation mechanisms in previous FTAs. In my view, however, the bureaucratic nature of the TPP's labor cooperation mechanism demonstrates a failure of imagination and a missed opportunity to learn lessons from previous FTA labor mechanisms. The creation of the similarly bureaucratic North American Commission on Labor Cooperation was trumpeted with great fanfare in 1993, but that Commission failed to achieve anything of note and has become moribund in recent years.

7. One important feature of the TPP Labour chapter is that it includes bilateral agreements between the United States and Brunei, Malaysia, and Viet Nam. These agreements—termed Consistency Plans (for Brunei and Malaysia) and Plan for Enforcement of Trade and Labor Relations (for Viet Nam)—state that they are subject to TPP dispute settlement. Some of the reforms detailed in these bilateral plans are pledged to be enacted before the date of entry into force of the TPP agreement. The attachment of such detailed labor commitments is a valuable new feature in US FTAs. Although the US FTA with Colombia was complemented with a "Colombian Action Plan Related to Labor Rights" in April 2011, the Colombian Plan contains mainly time-delimited obligations and does not purport to be linked to an enforcement mechanism.

8. Although the United States undertakes some oversight, assistance, and procedural commitments in these three side deals, only the US counterparty undertakes substantive labor commitments. For example, Malaysia agrees to "ensure that the use of subcontracting or outsourcing is not used to circumvent the rights of association or collective bargaining," but the United States does not make a parallel commitment.

9. The three Labor Plans are notable in their specificity of the statutory changes that Brunei, Malaysia, and Viet Nam pledge to make. The pledges are responsive to well-known deficiencies in their domestic labor laws that render them inconsistent with fundamental ILO norms, particularly with the ILO Convention of Freedom of Association and Protection of the Right to Organise (No. 87). Both the Malaysia and Viet Nam agreements contain a pledge by those countries to seek assistance from the ILO and Viet Nam goes further in agreeing to "implement recommendations provided by the ILO."

10. Two landmark features of the Viet Nam accord should also be noted: First, Viet Nam is given five years to improve law and practice in order to allow grassroots labor unions to form and join organizations of workers across enterprises and at sectoral and regional levels.[4] If Viet Nam fails to comply after five years, then a special mechanism allows the United States to withhold future TPP tariff reductions owed to Viet Nam. Should Viet Nam disagree with the United States as to whether Viet Nam has complied, then Viet Nam gains a right to bring a TPP dispute against the United States and the United States pre-commits to abide by the dispute panel's judgment. The second important new feature is that the Plan calls for an independent Labor Expert Committee to review Viet Nam's implementation of its commitments and to produce periodic reports containing findings and recommendations. The use of independent expert committees to monitor compliance with international labor law has been a central feature of the ILO's supervisory system since 1926. But until TPP, no FTA has employed ongoing independent monitoring for labor obligations.

11. The most detailed examination of the TPP Labour Chapter to come to my attention is contained in the December 2015 Report of the Labor Advisory Committee on Trade Negotiations and Trade Policy. Although many of the criticisms lodged by the Committee are cogent, the Committee's overall conclusions are unjustified by the facts:

-- The Committee asserts that the TPP's changes from the May 10 standard are "trivial" and that "none of the changes provide significant new protections for workers, nor do they remedy the completely discretionary nature of labor enforcement" (p. 16). Yet as detailed above, the changes from the May 10 standard are far more than trivial, and the detailed plans for Brunei, Malaysia, and Viet Nam clearly provide significant new protections for workers. While it is true that enforcement of TPP labor provisions is discretionary in that only governments can bring cases, that same limited standing exists for trade commitments too.

--The Committee asserts that the Brunei, Malaysia, and Viet Nam side letters "adopt the same failed approach as the Colombia Labor Action Plan" (p. 17). While reasonable observers might differ on whether the Colombia Plan was a failed approach,[5] clearly the Committee is wrong in calling the new side letters the "same" approach. As pointed out above, the new side agreements have much greater specificity than the Colombia plan and provide for dispute settlement.

12. The moral arc of labor rights has influenced world trade for over a century and the new TPP labor chapter makes a signal contribution toward governing the social

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[4]Currently, both Viet Nam and the United States have failed to ratify ILO Convention No. 87.

[5]In my view, the Plan has shown some success for the reasons outlined in https://ustr.gov/uscolombiatpa/labor.

dimension of global markets. This important labor chapter provides one more reason for the US Congress to enact TPP implementing legislation.

*Law Faculty, George Washington University, Washington, DC. Professor Charnovitz has lectured on international worker rights for over three decades. In 1983 as part of the US Caribbean Basin Initiative, he helped negotiate the first program of foreign trade-related labor commitments (with Haiti, the Dominican Republic, El Salvador and Honduras). Following 11 years with the US Department of Labor, Professor Charnovitz served as legislative assistant to House Speaker Jim Wright and Speaker Tom Foley (1987-91), Policy Director of the U.S. Competitiveness Policy Council (1991-95), and Director of the Global Environment & Trade Study at Yale University (1995-99). He has authored or edited several books including most recently *The Path of World Trade Law in the 21st Century* (World Scientific Studies in International Economics, 2015). Professor Charnovitz is a member of the Council on Foreign Relations and the American Law Institute and serves on the editorial board of the *World Trade Review*.

From: **steve charnovitz** charnovitz@me.com
Subject: Fwd: W&M Press -- Levin Releases Paper on Worker Rights in TPP
Date: March 28, 2021 at 2:32 PM
To:

COMMITTEE ON WAYS AND MEANS

Sander M. Levin (D-MI), Ranking Member

FOR IMMEDIATE RELEASE
February 1, 2016

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Levin Releases Paper on Worker Rights in TPP

WASHINGTON, DC – Ways and Means Committee Ranking Member Sander Levin (D-MI) today released an issue analysis paper [**PDF here**] prepared by the Committee's Democratic staff focused on worker rights in the Trans-Pacific Partnership (TPP) trade agreement. The analysis paper is part of the Committee Democrats' ongoing effort to increase public dialogue around key issues in TPP. A forum on this topic could not occur last week as a result of the snow storm impacting the Washington, D.C. area.

"This paper describes the most prevalent labor concerns in the relevant countries and provides a preliminary assessment of whether and how provisions in the TPP Agreement will address those concerns," **wrote the Committee's Democratic staff.** "In all cases, but for different reasons in each case, significant and legitimate concerns remain as to whether the labor standards of the May 10th Agreement will be fully implemented and enforced."

The Committee's Democratic members also requested views from a range of outside experts on the worker rights provisions in TPP. Submitted statements from the following experts can be found below:

- John Sifton, Asia Advocacy Director, Human Rights Watch
- Harley Shaiken, Professor, Graduate School of Education, University of California Berkeley
- Sabina Dewan, Executive Director, JustJobs Network
- Cathy Feingold, Director of International Affairs, AFL-CIO
- Steve Charnovitz, Associate Professor, George Washington University Law School

Ways and Means Committee Democrats have been hosting a series of intensive, in-depth forums on key issues in TPP called "Trading Views: Real Debates on Key Issues in TPP." Click here to read prepared remarks, analysis papers, and watch videos of previous forums on the environment, investment, access to medicines, currency manipulation, and auto rules of origin.

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Author's Postscript

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This paper, having been written in January 2016, does not cover events occurring thereafter.

Despite the progressive TPP provisions on trade, worker rights and many other issues, the US Congress did not approve the US membership in the TPP and US participation was withdrawn in 2017 by President Trump. A revised CPTPP went into force in December 2018.

In late 2019, the United States, Mexico, and Canada negotiated the USMCA agreement that contains far-reaching labor provisions. This author did an analysis of those provisions on December 13, 2019 entitled, "The Labor Rationale to Approve the USMCA", available at https://ielp.worldtradelaw.net/2019/12/the-labor-rights-rationale-to-approve-the-usmca.html.

To facilitate readers, this 2019 analysis is reproduced below:

Three days ago, the US, Mexico, and Canada completed talks to update the renegotiation of the North American Free Trade Agreement (NAFTA) that had begun in 2017 and had been touted as having succeeded in 2018. During the past three days, the trade community has perused the most recent version of the United States-Mexico-Canada Free Trade Agreement (USMCA) and widespread support within the United States (US) has been announced for the new agreement. Although in recent decades, free trade agreements (FTAs) have been a highly polarized issue in US politics, the new USMCA has drawn public support from across the spectrum — Republicans and Democrats, business and unions. Pulling this off is a notable political achievement for the Trump Administration.

On purely trade grounds, the United States would be better off if the US Congress rejected the USMCA in favor of just keeping the NAFTA. The USMCA is a mixed bag of pro-trade and anti-trade features. On the plus side, the USMCA expands FTA disciplines, reduces Canadian agricultural protection, and fixes the main procedural flaws in NAFTA's dispute settlement. In view of the successful attacks on WTO dispute settlement by the Trump Administration culminating this week in the destruction of the WTO appellate court, assuring the viability of the NAFTA dispute mechanism has grown in importance. On the minus side, the USMCA guts investor protections, subjects USMCA to automatic termination after 16 years, and enshrines a highly protectionist condition for automobile trade by requiring that certain value added be produced by workers earning at least $16 an hour. Given that $16 an hour is 221 percent of the US minimum wage, the condition is purely protectionist and has nothing to do with worker rights. Another problem is that one of the best features of the NAFTA, the acknowledgement of a North American economic, social and environmental community, is now dropped. By crossing out the "North American" name, the three governments are recasting the FTA into a purely transactional exercise and are digging up the promises planted in 1992 of building continental solidarity.

Recognizing the benefits of just staying loyal to the NAFTA, President Trump has put his thumb on the scale by threatening to pull the US out of the NAFTA if his USMCA is not approved. Although some analysts have argued that Trump does not have legal authority to pull the US out, I believe that the President does have that authority. A utilization of that Presidential authority would surely be challenged in federal court and given the present volatile legal climate, I would imagine that there would be at least one litigant who could find at least one federal judge to enjoin such a US departure. But in the end, US courts would uphold Presidential authority to quit a treaty in the absence of a federal law to the contrary. The costs of a US exit from NAFTA multiplied by the probability of its occurrence generates an additional reason to support the USMCA that, for me, puts the go or no-go choice on USMCA in equipoise.

The new labor rights provisions added to the USMCA change the equation and provide a solid reason to go with USMCA over NAFTA. The weight that I give to the labor aspect of the USMCA, no doubt, reflects the fact that for most of my career, I have been engaged as a US government official or as a scholar in developing or exploring the labor dimension to international trade agreements. As an International Relations Officer serving in the US Bureau of International Labor Affairs (ILAB) beginning in 1978, I developed an expertise on the labor-trade connection that in 1983 launched me onto the beachhead of the first US government initiative to lift labor conditions in particular countries as part of a trade liberalization negotiation. That was the Caribbean Basin Initiative (CBI) which for the first time included a labor condition in US legislation for extending preferential trade benefits. I credit former Congressman Charles Rangel for originating those provisions.

In 1983, I served on the US team that negotiated labor law and practice improvements with Haiti, the Dominican Republic, El Salvador, and Honduras. I inhaled first-hand the lesson that governments with entrenched labor rights violations would put those issues on the table in order to receive trade benefits. The numerous labor rights concessions promised by those governments were chronicled in an article I wrote at the time, "Caribbean Basin Initiatives: setting labor standards," *Monthly Labor Review*, Nov. 1984, https://www.bls.gov/opub/mlr/1984/11/rpt5full.pdf. I thank the two co-heads of that US delegation, Ambassador Robert Ryan and Assistant US Trade Representative Jon Rosenbaum, for supporting my efforts as labor specialist on the US negotiating team, including my investigation of worker rights violations in those countries.

The positive US experience with the labor condition in CBI catalyzed the incremental expansions over the next 36 years in the labor rights aspirations of future US trade laws and FTAs. Next up was the inclusion of labor conditions in the revision of the Generalized System of Preferences (GSP) in 1984. I credit former Congressman Don Pease for originating those provisions. Then in 1988, Pease championed the addition of a "worker rights" objective to US trade law for bilateral and multilateral trade agreements. This was an important development because it converted worker rights from an obligation that the US imposed on other countries (e.g., CBI) to a mutual obligation between the US and other FTA party. Although this worker rights objective was not attained in the NAFTA negotiations in 1992, Presidential candidate Bill Clinton promised to address that omission. In 1993, the Clinton Administration negotiated a NAFTA side agreement on labor. In 2000, the Clinton Administration negotiated an article on Labor to be included in the Jordan-US FTA. The expiration of fast track trade negotiating authority did not get fixed during the Clinton Administration, but in 2002, the Congress passed new negotiating authority that contained stronger and more specific worker rights negotiating objectives. These objectives were used in subsequent FTA negotiations such as the Dominican Republic- Central America Free Trade Agreement. In May 2007, the Bush Administration and Congressional leaders reached the so-called "Bipartisan Trade Deal" that established a template for incorporating internationally-recognized labor principles into new trade agreements. The Bush Administration modified three recently negotiated FTAs — for Colombia, Korea, and Panama — to include these new labor principles, but the agreements did not progress to ratification. The Obama Administration kept these FTAs on the shelf for two years, but in 2011 sent the FTAs to the Congress for approval which was quickly obtained. For Colombia there was an accompanying Action Plan for labor; for Panama, that government undertook certain labor domestic actions; and for Korea, the Obama Administration demanded some dilution of the free trade provisions. Although candidate Obama had campaigned in 2008 on the promise to renegotiate NAFTA's provisions on labor, he did not do so during his eight years in the White House. That failure provided a springboard for candidate Trump to decry the labor aspects of NAFTA as part of Trump's overall sharp criticism of the NAFTA. Upon entering the White House, Trump and his trade team began the NAFTA renegotiations that culminated in the new labor provisions announced earlier this week.

When I negotiated the CBI's labor requirements in 1983, the pushback I received from every CBI country was that it was hypocritical of the US to ask other countries to honor freedom of association and labor union rights when the US had refused to ratify the Freedom of Association Convention (No. 87) of the International Labour Organization (ILO). The gap between US practice and US negotiating demands was troubling to me. The ILO's Freedom of Association Convention is the most fundamental of ILO conventions. Adopted in San Francisco in 1948, the Convention was sent by President Truman to the US Senate in 1949 for approval. For over 70 years, the Senate Foreign Relations Committee has not found the time to hold a hearing on this core convention that has now been ratified by 155 countries (including Canada and Mexico). Even self-styled internationalists who have chaired the Senate Foreign Relations Committee, such as Senators John Kerry, Joe Biden, and Richard Lugar, have shown no interest in signing onto freedom of association. I discussed this Senate pathology in an essay in the *American Journal of International Law* in January 2008 titled "The ILO Convention on Freedom of Association and its Future in the United States" available at https://www.cambridge.org/core/journals/american-journal-of-international-law/article/ilo-convention-on-freedom-of-association-and-its-future-in-the-united-states/D17C8AD77C08056153A8C0673E949B11.

Although the first best approach for the United States to adhere to internationally recognized worker rights is to ratify ILO conventions, the inclusion of labor commitments in US trade agreements constitutes a second-best approach. In international law, it doesn't matter whether a country's commitment to a particular human right appears in a Treaty on X or a Treaty on Y. So I have often spoken out in favor of using trade agreements to commit the US government to take on new national commitments in support of internationally recognized worker rights. For example, see my article, "The U.S. International Labor Relations Act," *ABA Journal of Labor & Employment Law*, Winter 2011 at https://www.jstor.org/stable/41320580?seq=1#metadata_info_tab_contents. For those reasons, I was delighted to see how the Trump Administration is pushing the envelope forward so as to expand US commitments in international law in favor of worker rights.

Chapter 23 of the USMCA addresses labor and contains numerous obligations for the United States. These US obligations extend only to the federal level, not to the state level. Under this Chapter, Mexico and Canada would

be able to bring cases against the US for violations of the labor rights set out in USMCA. The prospect of establishing US accountability is important because although complaints against the US are sometimes brought in the supervisory mechanisms of the ILO, when the ILO finds a US violation, the ILO has no enforcement mechanism against the US. In contrast, the USMCA would give Mexico or Canada an enforcement mechanism to levy trade sanctions against the US should the US be found to be out of compliance with Chapter 23 and to fail to correct that violation.

Numerous USMCA provisions impose new international requirements on the US that the US might not always meet:

1. Article 23.3(1)(a) requires the US to adopt and maintain freedom of association and the effective recognition of the right to collective bargaining. Helpfully, this provision clarifies that "the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike." No such clarification existed in previous US FTAs whether ratified or unratified.
2. Article 23.3(1)(d) requires the US to adopt and maintain the elimination of discrimination in respect of employment and occupation.
3. Article 23.5 requires the US not to fail to effectively enforce its labor laws through a sustained or recurring course of action in a manner affecting trade or investment. The newly revised USMCA provides a rebuttable presumption that a failure to comply does affect trade or investment.
4. Article 23.6 requires the US to prohibit the importation of goods produced by forced or compulsory labor.
5. Article 23.7 (Violence Against Workers) requires the US to not fail to address "cases of violence or threats of violence against workers" related to the exercise of labor rights (in a manner affecting trade or investment with the same presumption above).
6. Article 23.8 (Migrant Workers) requires the US to "ensure that migrant workers are protected under its labor laws ...." This requirement might be of particular interest to Mexico.
7. Article 23.9 (Discrimination in the Workplace) requires the US to implement policies "that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity and caregiving responsibilities ...." Many aspects of this provision are unclear in the text. Since this provision is addressed to "policies" rather than to laws, the provision may have applicability to federal policies regarding states and cites. Another puzzle is the enigmatic footnote to this provision which states that this Article "requires no additional action on the part of the United States" in order for the US to be in compliance. The phrase "that it considers appropriate" would seem to suggest more of a subjective rather than an objective legal standard.

The FTA's statement about worker strikes is consistent with the jurisprudence of the ILO Committee on Freedom of Association and with the Committee of Experts, but may be inconsistent with the views of the US and international employer community as to the normativity of a right to strike under international labor law. Within the US legal system, this provision could be read as stating that there is federal right to strike embedded in freedom of association. The US National Labor Relations Act is interpreted as providing for a right to strike, but the Act as applied puts limitations on the right to strike.

The newly revised USMCA also contains a new Annex 31-A which would allow an international panel to make a Rapid Response on-site verification of certain covered company facilities within the US on the basis of allegations from one of the other governments that the facility is denying the rights of workers. Only US facilities under an NLRB order would be covered. Based on the findings of this independent panel, the complaining government might gain the right to impose “penalties" on goods or services or a denial of entry. On 12 December, Professor Kathleen Claussen posted a very helpful analysis of this provision as well as the other USMCA labor provisions.

I have no idea whether either of the USMCA governments would ever bring a labor case against the US. Except in the area of trade remedies, the USMCA, like the NAFTA, fails to provide any private right of action to bring cases against governments. Providing such a private right of action would be a much more effective way to enhance worker rights than expecting governments to lodge cases against each other.

In summary, the willingness of the Trump Administration to add strong worker rights to US obligations under USMCA is remarkable and has induced me to support US ratification of this labor-related trade treaty (or perhaps trade-related labor treaty).